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In The

Supreme Court of the United States

October Term, 1994

JOHN LILBURN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a statute which prohibits conduct intended to interfere with a hunter engaged in the lawful taking of a game animal facially overbroad in violation of the First Amendment?

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OPINIONS AND JUDGMENTS OF COURTS BELOW

In addition to the cases cited in the Petition at 1, Petitioner sought to litigate the constitutional issue presented in this case in a declaratory judgment action filed in the United States District Court for the District of Montana. The federal district court rejected Petitioner's complaint on abstention grounds, *Lilburn v. Racicot*, 855 F. Supp. 327 (D. Mont. 1991). Appendix to Brief in Opposition [hereinafter Opp. App.] 1a. The United States Court of Appeals for the Ninth Circuit affirmed the decision in an unreported opinion, *Lilburn v. Racicot*, No. 91-35310 (9th Cir. July 13, 1992).

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JURISDICTION AND TIMELINESS

Respondent agrees that the Court has jurisdiction of the petition. Respondent received service of the petition on October 27, 1994. This response is timely if served by First Class mail on or before November 28, 1994. Sup. Ct. R. 15.2, 29.2, 30.1.

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in the petition at 2. The verbatim text of the statutory provisions at issue is as follows:

> **87-3-141. Definitions.** As used in 87-3-141 through 87-3-144, the following definitions apply:
>
> (1) "Taking" means the pursuit, hunting, trapping, shooting, or killing of a wild

animal on land upon which the affected person has the right or privilege to pursue, hunt, trap, shoot, or kill the wild animal.

(2) "Wild animal" means any game animal, fur-bearing animal, or predatory animal, as defined in 87-2-101.

87-3-142. Harassment prohibited. (1) No person may intentionally interfere with the lawful taking of a wild animal by another.

(2) No person may, with intent to prevent or hinder its lawful taking, disturb a wild animal or engage in an activity or place in its way any object or substance that will tend to disturb or otherwise affect the behavior of a wild animal.

(3) No person may disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.

(4) Nothing in this section prohibits a landowner or lessee from taking reasonable measures to prevent imminent danger to domestic livestock and equipment.

STATEMENT OF THE CASE

In 1987, the Montana legislature enacted the Montana Hunter Harassment statutes, Mont. Code Ann. §§ 87-3-141 to -144, making it a misdemeanor offense to engage in various kinds of conduct that interferes with a lawful sport hunt. The statutes apply only to conduct occurring in the field that actually disturbs wildlife or interferes with a lawful hunt. *See* Pet. App. 11a. The legislature's motivation for enactment of the statute, as reflected in the legislative history and expressly found by the Montana Supreme Court, was to promote safety for hunters and for others using lands where hunting occurs, including those opposed to sport hunting, by avoiding contact, and potential conflict, between

armed hunters and persons intending to prevent the successful completion of a lawful hunt. Pet. App. 12a. The facts of this case demonstrate the soundness of the legislature's judgment.

On March 13, 1990, Petitioner John Lilburn was one of a group of individuals who attempted to disrupt a lawful bison hunt on national forest land in southwest Montana.[1] The group members unsuccessfully attempted to drive a bison herd into Yellowstone National Park, where hunting the bison would have been illegal. Pet. App. 3a. Petitioner then attempted to prevent one of the licensed hunters, Hal Slemmer, from making a shot. As Slemmer sighted in on a bison through the scope of his hunting rifle in preparation for making a shot, he saw Petitioner's head and torso suddenly appear in his scope. Petitioner had taken up a position directly between Slemmer and his target. Slemmer did not fire and raised the barrel of his rifle off his target. *Id.*

A nearby game warden confronted Petitioner, and Slemmer selected another target animal and prepared to make his shot. As Slemmer began to squeeze the trigger of his rifle, he again saw Petitioner's head and torso suddenly appear in the scope. Slemmer jerked his rifle skyward to avoid shooting Petitioner, who had again assumed a position directly between Slemmer and his target, a position roughly 10 to 12 feet from the muzzle of Slemmer's rifle. Slemmer and the game warden then

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[1]Montana amended its hunting laws in 1985 to include bison, statutorily referred to as "wild buffalo," among game animals subject to hunting, Mont. Code Ann. § 87-2-101(5), *amended*, 1985 Mont. Laws ch. 568, § 1, in response to the inability of officials of the National Park Service to control the migration from Yellowstone National Park into Montana of bison carrying the disease brucellosis. *See* Proceedings of Mont. Sen. Comm. on Fish & Game, Consideration of HB 763 (Mar. 12, Mar. 14, Mar. 21, and Mar. 26, 1985 (Mont. Legis. Council)). Brucellosis is a significant health hazard to domestic livestock. Montana cattle herds have been certified by the United States Department of Agriculture to be brucellosis-free. Loss of this designation would have significant detrimental impacts on Montana's cattle industry. *See Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400-02 (9th Cir. 1992). It was undisputed in the courts below that the hunt involved in this case was in all respects lawful under Montana's game laws.

proceeded to another area where Slemmer successfully killed a bison. Pet. App. 3a.

Petitioner states as fact in his petition that he said the words "Don't shoot" when he stood up in front of the muzzle of Slemmer's rifle. Pet. 4. The evidence presented in the state district court was in conflict with respect to the question of whether Petitioner said anything. Petitioner testified that he said the words "Don't shoot." Tr. 11. Game Warden Dave Etzwiler, an eyewitness in close proximity to the incident, denied that Petitioner said anything at all. Tr. 59, 63-64. Slemmer did not recall whether Petitioner spoke. Tr. 73. The Montana Supreme Court's recital of facts in its opinion makes no mention of Petitioner's alleged exclamation. Pet. App. 3a-4a. The court expressly found that Petitioner was not prosecuted for any expression or expressive conduct, but rather for his actions in placing his body between Slemmer and his target in such a way as to prevent the taking of the bison. Pet. App. 7a.

Petitioner was charged with the misdemeanor offense of hunter harassment in violation of Mont. Code Ann. § 87-3-143(3) (1989).[2] While the charges were pending in Justice Court, Petitioner filed a declaratory judgment action in the United States District Court for the District of Montana, seeking a declaration that the statute under which he was charged was unconstitutional. The Justice Court stayed proceedings pending the disposition of the federal suit. The federal district court dismissed the declaratory judgment complaint, holding that it should abstain from deciding the issue in deference to the pending State criminal proceedings. *Lilburn v. Racicot*, 855 F. Supp. 327 (D. Mont. 1991), *aff'd*, No. 91-35310 (9th Cir. July 13, 1992). Opp.

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[2]None of the other protestors was charged with an offense under the hunter harassment law arising from the events of March 13, 1990. There was no evidence in the record that law enforcement officers observed any other protestor interfering with a hunter about to shoot a bison, or engaging in any other conduct proscribed by Mont. Code Ann. § 87-3-142(3). There was evidence that protestors were observed by game wardens in possible violation of Mont. Code Ann. § 87-3-142(2), which prohibits herding of game animals to prevent a lawful hunt, Tr. 41-42, 50, but no charges were filed against any protestor under this subsection.

App. 1a. The Justice Court then denied Petitioner's motion to dismiss the complaint, and convicted him of the charge following a jury trial.

Petitioner appealed the conviction to State district court for trial de novo pursuant to Mont. Code Ann. § 46-17-311 (1991). The district court granted his motion to dismiss the complaint, holding that the statute under which he was charged was unconstitutionally overbroad and vague. Pet. App. 18a-30a. The State appealed the dismissal to the Montana Supreme Court, which reversed in a unanimous opinion, holding that the statute regulated "primarily conduct," Pet. App. 11a, and that to the extent it regulated expressive conduct or speech it did so without regard to communicative content. The court concluded that the statute withstood constitutional challenge under this Court's precedents dealing with facial overbreadth challenges to restrictions on speech and conduct, holding that any potential unconstitutional applications of the statute were speculative, and not "'substantial . . . judged in relation to the statute's plainly legitimate sweep.'" Pet. App. 8a-14a, *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The court rejected Petitioner's vagueness challenge, holding that the statute clearly applied to his conduct and accordingly that he lacked standing to challenge the statute for vagueness on its face. Pet. App. 16a-17a.[3]

[3]Although Petitioner includes a reference to vagueness in the question he presents, the petition contains no argument attacking the statute on vagueness grounds. Petitioner knew that interference with a lawful hunt was a violation of the statute. Tr. 15. This case does not present the vagueness issue Petitioner sought to argue in the Montana courts because, as the Montana Supreme Court found, a statute cannot be attacked on its face for vagueness by a party whose conduct clearly falls within the statute's prohibition. Pet. App. 16a-17a. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

SUMMARY OF ARGUMENT

1. There is no unacceptable conflict in lower court decisions which requires the exercise of this Court's jurisdiction in this case. Despite the fact that hunter harassment laws have been enacted in 48 states over the past ten years, there are only a handful of reported cases in which the constitutionality of the statutes has been tested. The cases that have stricken parts of other state laws involved statutes much different from the Montana statute at issue here. The lower courts are arriving at a level of consensus on the federal law issues presented by the few cases which have arisen, and this Court need not intervene at this time to provide guidance.

2. The Montana Supreme Court's decision is consistent with this Court's holdings and presents no important First Amendment issue. Petitioner's arguments proceed from a misreading of the statute and misapply or ignore the controlling decisions of this Court. The Montana statute is content-neutral because it does not facially discriminate among messages based on their content and it is justified by a non-content based legislative purpose--to prevent interference with lawful hunting activities, promote safety, and avoid dangerous confrontations between hunters and persons attempting to prevent hunting. The Montana court's decision correctly applied the principles of substantial overbreadth, holding that any hypothetical unconstitutional application of the statute would not be "real and substantial, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

REASONS FOR DENIAL OF THE PETITION

I. The Decisions of Other Lower Courts Are Not Inconsistent With the Montana Supreme Court's Decision in This Case.

Petitioner asserts that lower courts are divided on the issue presented in this case, and suggests that it is necessary for this Court to grant the writ to resolve these conflicts. The lower court decisions Petitioner cites involve statutory provisions which differ in material ways from the Montana law at issue in this case, and the treatment of those statutes by other lower courts is largely consistent with the Montana Supreme Court's decision here.

Dorman v. Satti, 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989), involved a Connecticut statute which had several parts. Like the Montana statute, it prohibited interference with a lawful hunt in progress. The statute went further, however, and also prohibited interference with "acts in preparation" for the lawful taking of an animal. The Second Circuit Court of Appeals upheld a federal district court's decision holding the statute overbroad insofar as it reached these "acts in preparation." Such acts could occur far from the field where the actual hunt would take place and could include, according to the reading of the Court of Appeals, such acts as "'buying supplies long before the actual hunt takes place . . . ; consulting a road map . . . ; making plans during a workplace coffee break; or even getting a good night's sleep before embarking on a hunting trip.'" 862 F.2d at 437, *quoting Dorman v. Satti*, 678 F. Supp. 375, 383 (D. Conn. 1988).

Significantly, the court of appeals in *Dorman* left undisturbed the federal district court's discussion of statutes such as the Montana law, which reach only conduct occurring in the field in the course of a lawful hunt. The Connecticut federal district court opined that a state clearly had the power to proscribe interference with hunters in the field during a lawful hunt, even when the interference was accomplished through what otherwise would be protected speech. 678 F. Supp. at 383.

Following the court of appeals' *Dorman* decision, the Connecticut legislature amended the Connecticut statute to delete the prohibition of interference with "acts in preparation" for a lawful hunt. Conn. Gen. Stat. § 53a-183a (1990). In *State v. Ball*, 627 A.2d 892, 897 (Conn. 1993), the Connecticut Supreme Court considered the amended statute, which is in many respects similar to Mont. Code Ann. § 87-3-142(3), and held that it was not a content-based restriction on speech.[4]

The Court need not grant the writ in this case to reconcile the Montana Supreme Court's decision with *Dorman*. The statute at issue in *Dorman* was materially different from the one involved in this case. Mont. Code Ann. § 87-3-142(3) (1989), unlike the Connecticut statute at issue in *Dorman*, has been definitively construed by the state supreme court to reach "only activities which occur in the field during an otherwise lawful hunt." Pet. App. 11a. The Montana statute thus does not suffer from the geographical and temporal breadth which led the courts to invalidate the Connecticut statute. Because it is limited in its scope to the course of an actual hunt in the field, it cannot be properly applied to "acts in preparation" occurring at other times and places. The federal district court's decision in *Dorman*, which the court of appeals left undisturbed, recognized that regulations such as the Montana statute are not unconstitutionally overbroad.[5]

Finally, the Court should disregard any tension between the Montana Supreme Court's decision in this case and the decision in *Dorman*. The amendment of the Connecticut statute has rendered the narrow holding in *Dorman* moot, since the

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[4]*Ball* remains in litigation in the Connecticut courts. The Connecticut Supreme Court remanded the case for further evidentiary hearings on the nature of the State's interest in regulating interference with sport hunting and on the nature of the forum involved. 627 A.2d at 899.

[5]The United States District Court for the District of Montana distinguished *Dorman* on these grounds in rejecting Lilburn's complaint for declaratory judgment. *Lilburn v. Racicot*, 855 F. Supp. 327, 329-30 (D. Mont. 1991), *aff'd*, No. 91-35310 (9th Cir. July 13, 1992). Opp. App. 6a-7a.

statute the court of appeals considered no longer exists. Moreover, *Dorman*'s analysis of the First Amendment issues presented is clearly wrong in light of this Court's cases. The Second Circuit apparently felt the Connecticut statute could be considered content-based for no other reason than that its effects fell more heavily on those opposed to sport hunting than on others. 862 F.2d at 437. This Court has consistently rejected similar arguments. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (regulation of rock music performances held content-neutral); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (ordinance zoning theaters based on content of films held content-neutral). The recent trend of decisions involving hunter harassment statutes in various states has been consistent with the analysis of the Montana Supreme Court on this key question. *State v. Casey*, 876 P.2d 138, 139-40 (Idaho 1994) (Idaho hunter harassment law held content-neutral); *Ball*, 627 A.2d at 897-98 (amended Connecticut statute held content-neutral).[6]

Petitioner's assertion that the Idaho Supreme Court's decision in *Casey* conflicts with the decision in this case is also wrong. The statute at issue in *Casey*, like the Connecticut statute at issue in *Dorman*, was not limited in its application to conduct which actually interferes in the field with the completion of a lawful hunt. Casey was charged under a subsection of the Idaho hunter harassment law which made it a misdemeanor to "[e]nter or remain in any area where any animal may be taken with the intent to interfere with the lawful taking or pursuit of wildlife." Idaho Code § 36-1510(1)(c). No similar provision is found in the Montana hunter harassment law. The Idaho court hypothesized that the Idaho statute could be violated by someone who "might enter an area where wildlife could be legally hunted and do nothing more than announce his opposition to hunting and his intention to interfere with such taking." 876 P.2d at 140. In contrast, the Montana Supreme Court held in this case that

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[6]In addition to these reported cases, the Kentucky hunter harassment law has been sustained against a First Amendment challenge in an unreported decision, *Barker v. Commonwealth*, No. 92-CA-2518-DG (Ky. Ct. App. Feb. 18, 1994).

violation of Mont. Code Ann. § 87-3-142(3) required actual disturbance of a lawful hunt. Pet. App. 10a-11a. The Idaho court recognized the distinction between the provision at issue in *Casey* and statutes such as Montana's by severing the subsection at issue from the Idaho statute and leaving in effect provisions similar to Montana's which require proof of actual disturbance of a lawful hunt. *Id.* at 141.

In addition to *Dorman* and *Casey*, Petitioner cites *Opinion of the Justices*, 509 A.2d 749 (N.H. 1986), as a state court decision alleged to conflict with the decision in this case. Pet. 12, n.5. The New Hampshire opinion considered only the question of the constitutionality *under the New Hampshire constitution* of a proposed hunter harassment law. The court expressly declined to reach the issue of the proposed legislation's validity under the First Amendment. 509 A.2d at 753. A conflict between the Montana Supreme Court's decision on an issue of federal law and the New Hampshire Supreme Court's decision on a similar state law issue is not grounds for exercise of this Court's jurisdiction. Sup. Ct. R. 10.1(b) (certiorari may be appropriate "[w]hen a state court of last resort has decided a *federal question* in a way that conflicts" (emphasis added)). Moreover, the New Hampshire opinion was an advisory one, issued in advance of the enactment of the provision at issue. The court did not discuss or apply the rule of *Broadrick* that a statute may be held facially unconstitutional under the First Amendment only if its potential unconstitutional applications are "real and substantial." 413 U.S. at 615. The issue decided by the Montana Supreme Court in this case--whether the statute is facially overbroad under *Broadrick*--was not presented or decided in the New Hampshire case.

Petitioner asserts that review by this Court of the question presented "would be of tremendous value to state and federal courts." Pet. 13. To the contrary, given the widespread enactment over the past ten years of hunter harassment laws throughout the country, it is remarkable that very few reported cases exist in which the statutes have been challenged. The state and lower federal courts do not appear to be struggling with these cases, and the recent decisions are arriving at a level of consensus with respect to the federal law issues involved. The different

outcomes in the various cases are attributable more to the variances in statutory approach from state to state than to any widespread uncertainty about the controlling federal law principles. These statutory variations make a decision by this Court in this case of limited value to lower federal courts and courts in other states.

Petitioner has cited no case in which a statute similar to the one at issue in this case has been held facially overbroad in violation of the First Amendment. In the absence of conflicting decisions considering similar statutes, the Court should deny the writ in this case.

II. The Montana Supreme Court's Decision Is Consistent With This Court's Precedents and Does Not Warrant Review.

A. The Montana Supreme Court's holding that the statute is content-neutral is consistent with this Court's precedents.

Petitioner argues that the Montana Supreme Court's determination that the statute is content-neutral is inconsistent with established First Amendment principles. This argument should be rejected because it relies on a misinterpretation of the statute and misreads this Court's decisions.

Petitioner asserts that the statute "is *expressly* directed at actions taken and statements made with the 'intent to dissuade' the listener from hunting." Pet. 13 (emphasis Petitioner's). While he carefully adds the words "actions" and "conduct" to his discussion, Petitioner's argument is premised throughout on the idea that the statute is designed to regulate speech, asserting, for example, that it "focuses on one particular form of 'disfavored speech,'" Pet. 14. A reading of the statute as a whole dispels the notion that the statute deals exclusively, or even extensively, with speech.

Petitioner assiduously avoids quoting the statute accurately, preferring to paraphrase its terms out of context. The statute does not punish speech qua speech, and it makes no reference to the intent to dissuade anyone "from hunting." The

conduct prohibited by the statute is the act of "disturbing" a person engaged in a lawful hunt. For purposes of the statute, "disturb" must be given the meaning used by the Montana Supreme Court in its opinion, *viz.*, to interfere with or interrupt, Pet. App. 13a, *see Webster's New Collegiate Dictionary* 333 (1977 ed.).[7] Although the legislature, to avoid application of the statute to accidental or inadvertent intrusions, defined the specific intent required to make such a disturbance criminal--"intent to dissuade the individual or otherwise prevent the taking of the animal"--the prohibition of harassment is primarily directed at conduct which actually disturbs a lawful hunt in progress with the intent to prevent the taking of an animal.

Concededly, an "intent to dissuade or otherwise prevent" a hunter from completing a hunt may arise from a defendant's philosophical opposition to hunting. However, as the Montana Supreme Court found, Pet. App. 13a, the intent can also arise from other attitudes, including the desire of the defendant to take the animal which the victim intends to take.[8] To the extent expressive conduct is relevant in a prosecution under the statute at all, the applicability of the statute does not depend on the kind of expressive conduct in which the defendant engaged. *Id.*

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[7]For this reason, among others, Petitioner's reliance on *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), is misplaced. In that case, the Court invalidated an ordinance which made it a crime to engage in expressive conduct "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race." The ordinance, unlike the Montana statute, discriminated against expression based on the ideas conveyed, and it criminalized expression based on the listener's subjective reaction. To violate the Montana statute, the defendant need not engage in expressive conduct at all, and the State need not prove that the victim reacted to the defendant's conduct in any way.

[8]*Compare, e.g., Dorman*, in which the plaintiff was originally prosecuted for attempting to talk a hunter out of hunting game birds, *with Barker v. Commonwealth*, No. 92-CA-2518-DG, slip op. at 3 (Ky. Ct. App. Feb. 18, 1994), in which the defendant asserted that he interfered with a deer hunter, not out of any philosophical dislike of hunting, but rather with the intention of driving deer from a vineyard to prevent damage to the trees. Slip op. at 3.

Interference by communication of any message, or no message at all, would be equally culpable, if accompanied by the requisite intent.

Petitioner asserts that the statute is content-based because speech of a certain content is more likely than other kinds of speech to evidence an intent to dissuade or prevent. Pet. 16 ("[t]he 'content of what was said' to a hunter will obviously be crucial to any determination of whether an individual had the requisite 'intent to dissuade'"). But this Court has expressly rejected the idea that the use of statements to prove intent violates the First Amendment. In *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201-02 (1993), the Court sustained a Wisconsin statute providing an enhanced penalty for bias-motivated crimes, disregarding arguments that the statute violated the First Amendment because a defendant's biased statements would be the best evidence of the proscribed motivation. Similarly, reliance on a defendant's statements in determining whether he or she intended to dissuade or prevent under this statute would not violate the First Amendment or render the statute overbroad.

The second reason for rejecting Petitioner's arguments is that they misapply this Court's decisions. Under this Court's precedents, a statute may be found content-based if it facially discriminates against speech of a certain content or if the statute was enacted with the aim of promoting or inhibiting speech of one content rather than speech of another. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). The above discussion demonstrates that a fair reading of the statute dispels the assertion that it fails the first prong of this test. Petitioner's reliance on *Turner Broadcasting* for the proposition that a content-neutral purpose cannot save a law that discriminates on its face based on content is therefore inapposite.

As to the second prong of the test, Petitioner appears to concede, Pet. 16-17, that the Montana Supreme Court accurately found that the legislature's intent in the enactment of the Montana statute was not to suppress speech, but to promote safety and avoid dangerous encounters between hunters and persons intending to interfere with them. Pet. App. 12a-13a. However, in citing cases such as *City of Houston v. Hill*, 482 U.S. 451 (1987), and *Boos v. Barry*, 485 U.S. 312 (1988), Petitioner

incorrectly assumes that the danger against which the Montana legislature wished to guard arises solely from the risk that hunters would be offended by speech and intentionally seek to injure protestors. To the contrary, the Montana legislature, fully familiar with the conditions which would exist in the field, was well aware that persons who intentionally interfered with an ongoing hunt were at great risk of accidental injury.

Montana law requires hunters to take precautions against their misidentification as a target. Hunters are required to wear orange clothing in the field, Mont. Code Ann. § 87-3-302 (1993), and young hunters receive training in firearm safety with the objective, among others, of avoiding conduct which brings hunters into each other's line of fire. *See* Mont. Code Ann. § 87-2-105 (1993). No such requirements apply to persons who go into the woods for the purpose of interfering with a hunt. Such persons frequently engage in unsafe conduct as part of their interference activities. *See* Sean P. Durrant, Comment, *Wyoming's Hunter Interference Law--Anarchy in the Woods: How Far Afield Does the Right to Free Speech Extend?*, 27 Land & Water L. Rev. 505, 505-07 & n.3 (1992) (describing documented examples of confrontations between hunters and protestors in the field). The facts of this case clearly demonstrate that the legislature's concern was grounded in fact. Petitioner came within a split second of being shot at close range with a high-powered rifle, not because Hal Slemmer was offended by any speech Petitioner uttered but because of Petitioner's own foolhardy behavior in stepping in front of a hunter about to make a shot.

Legislative intent to avoid such dangerous events, and to allow hunters to hunt without interference, are content-neutral motivations. The legislature recognized that debate would occur regarding the sport of hunting. It restricted that debate only insofar as it both occurred at a time and place presenting, in the legislature's judgment, unacceptable risk to persons in the field and interfered with lawful activities occurring there. Such a statute, regulating narrowly in a nonpublic forum, does not violate the First Amendment. *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2708-09 (1992). The Montana Supreme Court's decision sustaining the statute is fully

consistent with the controlling decisions of this Court involving similarly motivated laws, *e.g., Ward* and *Playtime Theatres*, with decisions dealing with statutes restricting speech as to time, place, or manner, *e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and decisions dealing with regulatory schemes operating in a nonpublic forum, *e.g., Lee*, 112 S. Ct. at 2708-09; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).[9]

B. The Montana Court's finding that the statute is not substantially overbroad does not warrant this Court's review.

A determination of whether the decision in this case warrants review demands a discussion of the governing principles in a facial overbreadth analysis. Petitioner, however, does not cite the seminal overbreadth case, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and does not state the governing principles announced in that case and reiterated by this Court as recently as the decision in *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2400-01 (1992).

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[9]Almost without exception, the cases Petitioner cites involved burdens directed at the press, *e.g., Turner Broadcasting* and *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), or restrictions on speech in traditionally public fora such as public streets, *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994); *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992); *Burson v. Freeman*, 112 S. Ct. 1846 (1992); *Boos v. Barry*, 485 U.S. 312 (1988); *City of Houston v. Hill*, 482 U.S. 451 (1987). In this case, Petitioner made no showing that national forests and other areas where sport hunting occurs are dedicated, either by tradition or government fiat, to use as a forum for expressive conduct. The only argument advanced by Petitioner in this regard in the courts below was that the places were areas where the public was allowed to go, a rationale which this Court has consistently rejected as a sole basis for a claim that a forum is a public one for First Amendment purposes. *United States v. Grace*, 461 U.S. 171, 177-78 (1983), *quoting Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). The burden of proof on this issue was on Petitioner, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984), and he failed to carry it.

Under *Broadrick*, a person, such as Petitioner,[10] whose conduct is not protected by the First Amendment is nevertheless allowed to challenge a statute on First Amendment grounds because the Court has recognized that some statutes sweep so broadly that their very existence can stifle significant amounts of protected speech. *Broadrick*, 413 U.S. at 611-12. However, a person whose conduct is not constitutionally protected must show more than that a statute has hypothetical unconstitutional applications. Since facial overbreadth is "manifestly strong medicine . . . employed by the Court sparingly and only as a last resort," *id.* at 613, a person alleging facial overbreadth must show that the statute's potential unconstitutional applications are "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

Beyond disagreeing with the Montana Supreme Court's conclusions, Petitioner never explains in what respect the court's decision is unfaithful to these principles. He simply argues that the rules which require a police officer on a city street to tolerate "a significant amount of verbal criticism," *Hill*, 482 U.S. at 461, somehow create a constitutional privilege to interfere with a lawful hunt by a private citizen on lands where such activity is expressly permitted. *Hill* announces no doctrine leading to such a conclusion.

The ordinance at issue in *Hill* made it unlawful to "in any manner oppose, molest, abuse, or interrupt any policeman in the

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[10]As the Montana Supreme Court specifically found, Petitioner did not argue in the courts below that his conduct in this case constituted "speech" protected by the First Amendment. Pet. App. 7a ("Lilburn . . . does not contend that his own conduct, which forms the basis of the charges brought against him, was constitutionally protected"). Although the petition is far from clear on this point, it makes, and indeed could make, no cogent argument that the First Amendment protects Petitioner's right to stand up in front of a hunter and prevent him from making a shot.

execution of his duty." This Court struck the ordinance, in part because "the First Amendment protects a significant amount of verbal criticism and challenge *directed at police officers*." 482 U.S. at 461 (emphasis added.) The Court invalidated the ordinance for two reasons: (1) It criminally proscribed verbal conduct toward police officers which is constitutionally protected, *id.* at 462; and (2) it gave police officers unbridled discretion in determining what conduct violates the ordinance, *id.* at 465-66.

Petitioner reads into *Hill* a constitutional right to subject hunters to "criticism and challenge," at least while hunting on public lands, and in the course of doing so to interfere with the hunters' lawful activities. Of course, the Montana statute as construed by the Montana Supreme Court does not prohibit such "challenge and criticism," except in those circumstances when it actually and intentionally disturbs a hunt. This Court recognized in *Lee* that such a restriction does not violate the First Amendment. Moreover, the City of Houston did not even attempt to justify the ordinance as a legitimate time, place, or manner restriction. No such argument could plausibly be made, since the ordinance applied throughout the city and at all times. The Montana statute, in contrast, only operates during limited times and in places where a lawful hunt is occurring. *Hill* is therefore not in point.

Petitioner next argues that the Montana statute "essentially 'forecloses an entire medium of expression'." Pet. 19. This argument is virtually incomprehensible. The cited authority, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), dealt with an ordinance prohibiting exhibition of residential yard signs. How that case applies here is never explained in the petition. However, this Court has quite clearly rejected Petitioner's "medium is the message" argument. Pet. 19. The First Amendment does not create a right of access to the most efficient, effective, or "poignant" forum for speech. "The First Amendment does not demand unrestricted access to a nonpublic forum merely because that forum may be the most efficient means of delivering the speaker's message." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985).

Petitioner's reliance on the Court's recent decision in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), is

also misplaced. That case involved an injunction against certain activities of protestors at abortion clinics. As the Court's opinion makes clear, several factors distinguish this case. First, the injunction prohibited speech in "a traditional public forum," *viz.*, a city street, not in a national forest which has not been shown to be a public forum by tradition or designation. *Id.* at 2524. Second, the Court found that heightened scrutiny was appropriate because the restraint at issue was an injunction, rather than a statute like the one at issue here. *Id.* at 2525. Finally, the provision at issue in *Madsen* prohibited *all* unsolicited approaches by the persons subject to the injunction. The statute at issue here, in contrast, prohibits only conduct which disturbs the lawful activities of hunters, leaving a wide area in which a protestor's conduct or communication is unaffected by the statute.

The Montana Supreme Court found that the potential for unconstitutional application of the statute was far exceeded by the statute's legitimate sweep. Pet. App. 14a. Petitioner does not challenge this conclusion, preferring to ignore the requirements for "substantial overbreadth" in favor of a series of overstated assertions of the statute's supposed infirmity.[11] Unlike Petitioner's arguments, the Montana court's application of the overbreadth test is faithful to this Court's precedents. It does not warrant certiorari review.

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[11]For example, Petitioner's assertion that the Montana statute, "in effect, renders vast amounts of *public land* off limits to First Amendment speech and conduct" (emphasis Petitioner's) is pure hyperbole. First, public lands being used for hunting are not well suited for exchange of ideas, as Petitioner recognized in his testimony in this case. Tr. 11, 23. Second, the statute can only apply during those limited times when hunting is in season. Speech and conduct at other times are unaffected by the statute. Third, not all First Amendment speech and conduct will disturb a lawful hunt. Speech and conduct that do not are unaffected by the statute. Fourth, actual hunts occur on a very small percentage of the public land at any given time. Speech and conduct in areas where a hunt is not in progress are unaffected by the statute.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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November 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

JOHN LILBURN,

Plaintiff,

-v-

MARC RACICOT, Attorney general of Montana; MIKE SALVAGNI, Gallatin County Attorney; K.L. COOL, Director of Montana Department of Fish, Wildlife and Parks; GEORGE HUBBARD, Warden Captain Montana Department of Fish, Wildlife and Parks,

Defendants.

CV 90-56-M-CCL

ORDER
(Filed
Jan. 22, 1991)

* * *

BACKGROUND

On March 13, 1990, Gallatin County Attorney Mike Salvagni, filed a complaint against John Lilburn in Gallatin Justice Court on behalf of the State of Montana alleging that John Lilburn committed the offense of harassment, a misdemeanor offense, in violation of Montana Code Annotated 87-3-142(3). The complaint alleges that John Lilburn purposely or knowingly disturbed an individual engaged in the lawful taking of a wild animal, specifically a buffalo which had traveled beyond the boundaries of Yellowstone National Park. The complaint states that Lilburn disturbed the hunter with the intent to

dissuade or otherwise prevent the taking of the buffalo when Lilburn placed himself between the buffalo and the hunter who was aiming a loaded rifle at the buffalo.

Following the filing of the complaint in Gallatin County Justice Court, Lilburn filed this action against the Attorney General, the Gallatin County Attorney, and the Department of Fish, Wildlife, and Parks alleging his civil rights were violated when he was arrested by state officials for violating an allegedly unconstitutional state law. Plaintiff Lilburn states the Hunter Harassment Act is unconstitutionally vague in that it fails to define prohibited conduct with any degree of specificity and is overbroad in that it forecloses his right to exercise free speech in violation of the First Amendment. Plaintiff seeks declaratory judgment that the Act is unconstitutional on its face or is unconstitutionally applied against him; injunctive relief restraining defendants from enforcing the act; and recovery of attorney's fees pursuant to 42 U.S.C. § 1988.

Defendants move to dismiss the complaint in federal court on the grounds that the federal court should abstain from interfering in an ongoing state criminal action. Plaintiff opposes the motion on the grounds that the Hunter Harassment Act is so clearly unconstitutional on its face that the federal court should intervene; that the justice court is an improper forum in which to consider a constitutional issue; and that forcing him to litigate this issue through the state court system will cause considerable delay and inconvenience.

Although abstention from the exercise of federal jurisdiction is the exception, not the rule, *Colorado River*

Conservation District v. United States, 424 U.S. 800, 813, (1986), abstention is appropriate if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, (3) and the state proceedings provide an adequate opportunity to raise federal questions. *Younger v. Harris*, 401 U.S. 37 (1971). However, federal intervention may be warranted if petitioner can show he comes within the special circumstances exception to *Younger* such as proven harassment by state officials, bad faith prosecutions, or extraordinary circumstances such that petitioner would suffer irreparable injury if the federal court did not intervene. *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

Here, Plaintiff Lilburn focuses on the third prong of *Younger* arguing that the defendants fail to show the state proceedings provide an adequate opportunity to raise federal questions. Plaintiff suggests that the justice court where he is being prosecuted for the misdemeanor criminal offense is an inappropriate forum in which to consider constitutional questions and argues that the Montana Supreme Court has so found in *State v. Tollefson* ___ Mont. ___, 780 P.2d 621 (1989).

In *Tollefson*, the State moved for a writ of supervisory control after the Justice Court found unconstitutional the statute which provides for a rebuttable presumption on blood alcohol content in a DUI case. In *dicta*, the court pointed out that review of a constitutional question in this particular case was difficult because there was no court record and therefore questioned whether a justice court can be a proper forum for a consideration of the constitutionality of a statute. The Montana Supreme Court reviewed the Justice Court's ruling and reversed.

Significantly, the court stated that because its ruling was for the purposes of this case only, the issue could be raised again in the event the defendant was convicted and obtained a de novo trial in district court.

Tollefson is not persuasive on the issue of whether a justice court provides an adequate opportunity to raise a constitutional issue. The language relied upon is *dicta* and the court specifically pointed out defendant could raise the issue again in district court. Plaintiff complains that such interpretation of *Tollefson* will force him to appeal to the state district court, and state Supreme Court in order to reach federal court. Cost, anxiety, and inconvenience of having to defend against a state prosecution, however, does not preclude a federal court from abstaining from interfering in a state prosecution. *Younger*, 401 U.S. 37, 46 (1971). Moreover, a state has a special interest in enforcing its own laws in its own courts. Officers of the State "are charged with the duty of prosecuting the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statue [sic], unless it plainly appears that this course would not afford adequate protection." *Id.* at 45.

Finally, the very problem of which plaintiff complains, exhausting the state process first before reaching the federal forum, is at the heart of the abstention doctrine. As the Supreme Court has stated:

> "*Younger* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. . . . . The notion of

> 'comity' includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'. . . . Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights. *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982).

Here, Plaintiff Lilburn is presuming that the state's process will not protect his constitutional rights merely because he is in justice court. He further presumes some higher state court will not agree with his arguments on the constitutionality of the Hunter Harassment Act. Such presumptions are not warranted. Montana Judges, including justices of the peace, are subject to and bound by the federal constitution. *Pennzoil v. Texaco,* 107 S.Ct. 1519, 1528 (1987).

Plaintiff also argues that because the Montana statute is so plainly unconstitutional on its face, federal intervention is warranted to stop the state from infringing upon his constitutionally protected right of free speech. The court disagrees. Hunting is a legitimate activity which the state may protect in any reasonable and constitutionally permissible manner. Although the statute may inhibit speech to some limited degree, it also protects hunters and those opposed to hunting from the very kind of harm which may have occurred when the plaintiff stepped in front of the hunter, who was pointing a loaded rifle at a

bison. The goal of the statute is clearly reasonable. "The existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but – while regulating a subject within the State's power – tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Younger* at 51 (citations omitted). Here, regulating hunting, including interference with hunting, is clearly within the State's power.

Plaintiff points out that at least one Court of Appeals has declared a hunter harassment statute unconstitutional because it interfered with free speech. *Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988) However, in *Dorman*, there was no pending state action as here, and hence the court was not faced with interfering with an ongoing criminal prosecution. Moreover, the statute involved in *Dorman* prohibited persons from interfering with another person who was taking or *preparing to take* wildlife. The court found such language too broad because the clause "preparing to take" could be construed to encompass buying supplies long before the actual hunt takes place, consulting a road map, making plans during a workplace coffee break, or even getting a good night's sleep before embarking on a hunting trip. *Id.* at 437 (quoting district court's opinion). The particular subsection under which plaintiff Lilburn is charged, however, contains no such language but rather proscribes behavior which interferes with an individual

actually engaged in the lawful taking of a wild animal. Mont. Code Ann. § 87-3-142 (3).

Plaintiff has not attempted to exhaust his remedy under state law, and has not established the "special circumstances" required for federal intervention. Accordingly, this court is prohibited by principles of comity from considering his claim and request for relief.

IT IS THEREFORE ORDERED that defendants' motion to dismiss is GRANTED.

The Clerk shall forthwith notify counsel of entry of this order.

Done and dated this 22 day of January, 1991.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge